APPENDIX

OPINION OF SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

[January 13, 1966]

Per Curiam:

The petition herein alleged that respondent had been guilty of professional misconduct as set forth in nine separate charges. After hearings, a Referee reported that eight of the charges had been sustained. Charge No. 4, which the Referee dismissed, involved the compromise of infants' claims without court order. The Referee's report should be confirmed except as to his conclusion on Charge No. 4, which in our opinion should also have been sustained.

The charges included the "farming out" of negligence cases — in which respondent had been retained on a contingent fee basis — under arrangements whereby respondent obtained loans or advances on his 50% share of the fees, without regard to the services or responsibility of the respondent in the cases (Charge No. 1); conversion of a client's funds (Charge No. 2); failure to remit within 15 days, as required by Special Rule IV(4)(a), settlement funds to personal injury claimants (Charge No. 3); compromise of infant claims without court order (Charge No. 4); failure to file Statements of Retainer (Charge No. 5); failure to file closing statements (Charge No. 6); failure to maintain a special account for the deposit of settlement funds (Charge No. 7); harboring a disbarred lawyer in respondent's law office (Charge No. 8); and failure to uphold the honor and dignity of the profession by the use of profanity and the addressing of a racial epithet to a witness at the close of a matrimonial action after the presiding justice had left the courtroom (Charge No. 9).

Although respondent had been examined under oath at the inception of the investigation by the Coordinating Committee on Discipline, respondent did not testify on his own behalf at the hearings before the Referee. In *Matter of Wysell*, 10 AD2d 199, 202, this Court alluded to the consequences of the failure of an attorney to testify in a disciplinary proceeding in the following language:

> "Disciplinary proceedings are not criminal proceedings, and the refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict' (*Matter of Association of the Bar of the City of N.Y. v. Randel*, 158 N.Y. 216, 219.) For '[i]f there was any possible statement that the defendant could have made, calculated to explain his conduct and relieve himself from the serious consequences of the facts as disclosed by this record, he should have taken the stand, made a full statement and submitted himself to cross-examination.' (*Matter of Association of the Bar of the City of N.Y. v. Randel, supra*, p. 221.)"

After the Referee's report was filed, respondent moved in this Court to reopen the hearing so as to permit consideration of his testimony before the Co-ordinating Committee. We have denied that motion. It should be noted that respondent had objected to the introduction of that testimony when offered at the hearings before the Referee. As a consequence, only admissions against interest were introduced in evidence. But even if the entire testimony were before the Referee, that would still not be a proper or adequate substitute for respondent's obligations to take the stand and be cross-examined as to any testimony he might give in attempted explanation of his conduct.

The testimony under Charge No. 1 revealed that respondent indulged in the practice of accepting contingent fee retainers in accident cases with the intention of for-

warding those cases to other attorneys for handling under arrangements whereby respondent would obtain immediate financial benefits for himself in the form of loans or advances against his agreed share — 50% of the net fees resulting from trial or settlement of the cases by the forwardee-attorneys — with little or no service and responsibility to be rendered or assumed by respondent. During the 15-month period, July 1, 1959 — September 30, 1960, respondent transferred 15 such negligence cases to one firm of attorneys; 37 cases to another firm; and 38 cases to a third attorney (34 of these cases had been re-transferred from the second set of attorneys). In each instance, when respondent "farmed out" these negligence cases, he obtained loans of money from the attorneys to whom he had transferred the cases, to be repaid from respondent's share in the net fees to be realized. Moreover, the cases were transferred to new counsel without any prior notice by respondent to his clients or any inquiry by him concerning their wishes in the matter.

The Referee found that in "farming out" negligence cases, under arrangements whereby respondent was to share in 50% of the fees, respondent violated Canon 34 of the Canons of Professional Ethics of the New York State Bar Association and Rule V of the Special Rules of this Court. That Canon and our Rule V interdict the division of fees for legal services upon any basis other than a division of services or responsibility.

In *Greenwald v. Zyvith*, 23 A D 2d 201, the Court in discussing Canon 34 said (pp. 203, 204):

> ". . . This canon is designed, in part, to keep the profession of law from becoming an ordinary business. It gives substance to the admonition of canon 12 that 'the profession is a branch of the administration of justice and not a mere money-getting trade.' Canon 34 thus condemns both the 'finder's fee', payable regardless of the service performed

> or responsibility assumed by a forwarding lawyer, as well as the unearned divided fee, taken by an attorney who has assumed the role of an 'attorney of record' but who, in fact, has neither rendered service nor assumed responsibility in the handling of the case (Drinker, Legal Ethics [1953 ed.] 186)."

In *Matter of Connelly, Etc.*, 18 AD2d 466, 469, this Court held that lawyers are expected to adhere to the dictates of the Canons "and any substantial breach thereof is considered as professional misconduct which may be the subject of disciplinary action in accordance with the provisions of said subdivision 2 of Section 90 of the Judiciary Law."

There is no question that respondent's conduct with respect to the "farming out" of negligence cases was in clear violation of Canon 34 and our Special Rule V. In addition, we strongly disapprove of such trafficking in negligence cases as if dealings were being had in commodities in ordinary business. Nor will this Court condone transactions which in effect constitute the pledging of contingent fees in negligence cases as security for the payment of loans or advances. Respondent's conduct with respect to the "farming out" of the negligence cases constituted serious professional misconduct.

It serves no purpose to discuss in detail the evidence upon which the other charges were clearly sustained. Conversion of a client's funds is serious misconduct; (*Matter of O'Doherty*, 14 AD2d 4 affd. 11 NY2d 1028) even where the amount may be comparatively small (*Matter of Longo*, 274 App. Div. 14). Failure to comply with the Special Rules of this Court governing the conduct of attorneys as to filing Statements of Retainer, Closing Statements and timely remission of settlement funds to clients constitutes professional misconduct. (*Matter of Kiley*, 22 AD2d 527, 528.) Respondent's association with, and employment of, the disbarred attorney, Sohmer, in respondent's law office is the type of conduct which re-

ceived condemnation by this Court in *Matter of Lerner*, 270 App. Div. 602, 603.

With respect to Charge No. 4, involving the compromise of infants' claims without court order, this Court has ruled that the failure to obtain judicial approval of infants' settlements is grievous misconduct. (*Matter of Feldman*, 17 AD2d 553, 558.) The Referee concluded that since the accident, in which the infants mentioned in the Charge were injured, occurred in New Jersey and the case was settled with a New Jersey Casualty Company, respondent could be excused from following the procedure for settling infants' claims provided for in our Special Rule VI. There is nothing in that Rule, nor in CPLR 1207, 1208, which restricts its application to New York accidents. Since no action was commenced in New Jersey, the settlement of the claims in New York involving New York infants required that the compromise be approved by a court. Respondent was not permitted to rely on the carrier's practice to omit obtaining a compromise order (*Matter of Feldman, supra*, at p. 557). Nor did the fact that the accident occurred in New Jersey excuse the failure by respondent to file Statements of Retainer and Closing Statements with respect to the claims of these infants.

The evidence before the Referee, and the findings which we confirm, demonstrate, in their cumulative effect, serious professional misconduct on the part of respondent. What is more, respondent did not testify and attempt to explain his conduct or show why he should be relieved from the grave consequences which might flow from the facts demonstrated by the record.

In determining the measure of disciplinary sanction to be meted out, we have, of necessity, considered respondent's past disciplinary record. Respondent was admitted to the Bar by the Appellate Division, Second Department, on May 7, 1924. In January, 1928, respondent was disbarred by the Second Department, after he

had pleaded guilty to a felony count in an indictment in the U.S. District Court for the Eastern District of New York charging him with using the mails to defraud casualty companies into paying money to fraudulent claimants for alleged personal injuries (*Matter of Kaye*, 222 App. Div. 829). In June, 1935, respondent was reinstated by the Second Department, after he had received a Presidential pardon. (*Matter of Kaye*, 243 App. Div. 615.)

In April, 1953, this Court suspended respondent from practice for one year on a charge of knowingly issuing bad checks (*Matter of Kaye*, 281 App. Div. 508). Our Per Curiam in that case noted that:

> "Respondent has previously been admonished with respect to his conduct and professional associations. He appears not to have taken the admonition sufficiently seriously."

Respondent was reinstated by this Court on September 1, 1954.

Despite these prior difficulties, respondent has evidently continued to violate the rules of correct professional conduct in grave respects. His conduct strongly suggests the likelihood that he will continue to bring the profession into disrepute. Under the circumstances, the respondent should be disbarred.

ALL CONCUR

ORDER OF DISBARMENT
[Entered January 13, 1966]

Peter R. Kaminer, Magnus Lipton and Abraham Shamos, as members of the Co-ordinating Committee on Discipline of The Association of the Bar of the City of New York, The New York County Lawyers' Association and Bronx County Bar Association, by Henry Weiner, Esq., their attorney, having presented to this Court on

the 26th day of May, 1964, a petition containing charges of professional misconduct against the above-named respondent, Louis Kaye (admitted as Louis Kaminetsky), who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 7th day of May, 1924, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the Respondent having appeared herein by attorney, Arthur F. Lamanda, Esq., and having interposed an answer to said petition, duly verified the 22nd day of July, 1964, and the Court having duly made and entered an order on the 7th day of July, 1964, appointing Raphael P. Koenig, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated the 23rd day of July, 1965, and was filed in the office of the Clerk of this Court on the 27th day of July, 1965;

And thereafter and on the 6th day of October, 1964, respondent having moved this Court for an order dismissing Charges 8 and 9 for lack of jurisdiction, suppressing the use at the hearing before the Referee of the evidence used as a basis of the allegations set forth in Charges 2 to 8 inclusive of the petition, and for other relief, which motion was denied in all respects by order of this Court entered on October 29, 1964;

And the petitioner thereafter and on the 19th day of October, 1965, having moved for an order confirming in part and disaffirming in part the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper; and the respondent having

moved for an order confirming in part and disaffirming in part the Referee's report and dismissing the charges against respondent in all respects;

Now, upon reading the petition of the Co-ordinating Committee on Discipline, verified the 12th day of May, 1964, the affidavit of Henry Weiner, Esq., annexed thereto, sworn to the 12th day of May, 1964, the notice of presentation of said petition dated the 12th day of May, 1964, with proof of due service thereof upon the respondent, the order of this Court, dated the 7th day of July, 1964, appointing Raphael P. Koenig, Esq. as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 7th day of July, 1964, the answer of the respondent to said petition, verified the 22nd day of July, 1964, the report of Raphael P. Koenig, Esq., the Referee herein, dated the 23rd day of July, 1965, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 27th day of July, 1965; and upon reading and filing the notice of motion for an order confirming in part and disaffirming in part the report of the Referee and adjudging the respondent guilty of professional misconduct, dated the 13th day of September, 1965, with proof of due service thereof, and the notice of motion for an order confirming in part and disaffirming in part the report of the Referee and dismissing the charges against respondent, dated the 18th day of October, 1965, with proof of due service thereof, and after hearing Mr. Angelo T. Cometa for the motion to confirm in part and disaffirm in part the Referee's report and adjudging the respondent guilty of professional misconduct and Mr. Matthew A. Campbell for the motion to confirm in part and disaffirm in part the Referee's report and dismiss the charges against respondent in all respects, and due deliberation having been had thereon; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counsel-at-law, it is hereby unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is disbarred from practice as an attorney and counsel-at-law in the State of New York effective February 14, 1966; and it is further unanimously

Ordered that the name of said Louis Kaye (admitted as Louis Kaminetsky) be struck from the roll of attorneys and counselors-at-law in the State of New York effective February 14, 1966; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective February 14, 1966; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective February 14, 1966; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto effective February 14, 1966.

PORTION OF ORDER AMENDING DISBARMENT ORDER

[Entered April 19, 1966]

It is ordered that the said motion be and the same hereby is granted to the extent of amending the order of disbarment of this Court entered on January 13, 1966, to recite the following: "Upon the matter there were pre-

sented and necessarily passed upon questions under the Constitution of the United States, viz., whether respondent's rights under the Fourth, Fifth and Fourteenth Amendments were violated. The Court held that they were not." In all other respects, the motion is denied.

ORDER DENYING MOTION TO REMAND, ETC.
[Entered January 13, 1966]

The above-named respondent having moved this Court for an order remanding this proceeding to the Referee for the purpose of receiving into evidence the testimony of respondent given before the Co-ordinating Committee on Discipline and permitting the parties to file additional briefs to the Referee, or, in the alternative, directing that all of respondent's aforesaid testimony be incorporated in the record before this Court and permitting the parties to file supplemental briefs to this Court,

Now, upon reading and filing the notice of motion, dated October 20, 1965, with proof of due service thereof, and the affidavit of Louis Kaye, duly sworn to the 21st day of October, 1965, in support of said motion, and the affidavit of Angelo T. Cometa, duly sworn to the 22nd day of October, 1965, in opposition thereto, and after hearing Mr. Matthew A. Campbell for the motion, and Mr. Angelo T. Cometa opposed,

It is ordered that the said motion be and the same hereby is denied in all respects.

[SUBPOENA]

The People of the State of New York

To: LOUIS KAYE, ESQ.
42 Broadway
New York 4, N. Y.

Greeting:

We command you, That all business and excuses being laid aside, you appear and attend before the Co-ordinating Committee on Discipline at 100 Centre Street, Room 1535, in the City of New York, State of New York on the 10th day of January, 1964 at 2:00 o'clock in the afternoon, and at any adjourned date to testify and give evidence in a preliminary investigation of Practices of Attorneys in Personal Injury Claims, now being conducted pursuant to the order of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, and that you bring with you, and produce at the time and place aforesaid, the following:

> your legal and correspondence files with respect to personal injury claims prosecuted on behalf of clients in those cases where a check in settlement of such claim, or in payment thereof after verdict, was issued in 1960, 1961, 1962 or in 1963, together with your distribution checks to clients in such cases, together with copies of statements of retainer and closing statements filed in such cases,

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises. And for a failure to attend, you will be deemed guilty to a contempt of Court,

Witness, Honorable BERNARD BOTEIN, Presiding Justice of the Appellate Division of the Supreme Court

of the State of New York, First Department, at New York, N.Y., the 9th day of December, 1963.

/s/ VINCENT A. MASSI,
Clerk of said Court

/s/ HENRY WEINER
Attorney for Co-ordinating Committee on Discipline

EXCERPTS FROM REPORT OF REFEREE
[Dated July 23, 1965]

The answer of the respondent denies each and every allegation of the charges and sets up as an affirmative defense that he is the victim of a plot on the part of two persons known to the petitioner. These persons extracted his private papers against his will and said papers have become the source of knowledge and information upon which the petitioner proceeded. Consequently the proceeding is in violation of his constitutional rights, privileges and immunities. Said rights are further violated by the ex parte examination of witnesses and others. He further alleges that he was not afforded an opportunity to invoke any constitutional privilege and appeared and gave testimony in order not to be charged with contempt or lack of cooperation. He asserts that he has never waived "his constitutional privileges as a citizen and invokes the rights, privileges and immunities afforded to him under the Bill of Rights, Article 14 of the United States Constitution and under article 1, Section 6 of the New York State Constitution and all other provisions therein, whereby citizens are protected against the invasion of their constitutional rights against self-incrimination and against the unlawful search and seizure of private papers and other information without a search warrant having been duly obtained." He contends "that he is entitled to the same general immunities as any citizen of the United States, and therefore invokes said rights and privileges and immunities in this proceeding."

* * *

Upon the receipt of the charges herein, respondent moved for an order at a term of the Appellate Division which requested, among other relief, for an order suppressing the use at the hearing before the Referee of the evidence used as a basis of the allegations set forth in Charges 1 to 8 inclusive, on the ground that such use at the hearing would be a deprivation of the rights of the petitioner arising under the Federal Constitution, under the New York State Constitution, and under the New York State Bill of Rights. The motion was denied in all respects on October 29, 1964.

An action was brought in the United States Court for the Southern District of New York and in connection therewith a stay of the proceedings herein was requested until such time as that court determined the legality of the means by which certain information and data were obtained (S.M. p. 718). That stay was denied (S.M. p. 729). It is assumed that both in the Appellate Division and the United States District Court the contentions of the respondent were similar to those urged before me. While I agree with the decisions and would decide that no violation of any rights have occurred, I feel that the law of the case has been established and that there is no constitutional question which I have to consider.

* * *

TELEGRAM
[Dated March 31, 1966]

MOTION FOR LEAVE TO APPEAL AND FOR A STAY DENIED RAYMOND J CANNON CLERK COURT OF APPEALS ALBANY NY